UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF SOUTH CAROLINA

CHARLESTON DIVISION

craigslist, Inc., **Plaintiff,** **v.** **HENRY D. McMASTER, in his official capacity as ATTORNEY GENERAL OF THE STATE OF SOUTH CAROLINA; DAVID PASCOE; BARBARA R. MORGAN; C. KELLY JACKSON; JAY E. HODGE, JR.; W. BARNEY GIESE; DOUGLAS A. BARFIELD, JR.; TREY GOWDY, III; JERRY W. PEACE; SCARLETT WILSON; CHRISTINA T. ADAMS; DONALD V. MYERS; EDGAR L. CLEMENTS, III; ROBERT M. ARIAIL; I. MCDUFFIE STONE, III; GREGORY HEMBREE; AND KEVIN S. BRACKETT, in their official capacities as SOUTH CAROLINA CIRCUIT SOLICITORS,** **Defendants.**	**Civil Action No.** 2:09-1308-CWH **PLAINTIFF CRAIGSLIST'S MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION AND MEMORANDUM IN SUPPORT** ORAL ARGUMENT REQUESTED

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Plaintiff craigslist, Inc. ("craigslist") requests that the Court, pursuant to Federal Rule of Civil Procedure 65, issue:

(1) an order temporarily restraining Defendant Henry D. McMaster ("McMaster" or "Defendant McMaster"), in his official capacity as Attorney General of the State of South Carolina, and the other Defendants, in their official capacities as South Carolina Circuit Solicitors, and all of their officers, agents, servants, employees, and attorneys, and those persons in active concert or participation with them from engaging in the following conduct until the Court may consider craigslist's motion for preliminary injunction: from issuing further threats of prosecution against craigslist or its officers and employees in relation to content posted by third parties on craigslist's website and from initiating or pursuing any such prosecution; and

(2) an order preliminarily enjoining Defendant McMaster, in his official capacity as Attorney General of the State of South Carolina, and the other Defendants, in their official capacities as South Carolina Circuit Solicitors, and all of their officers, agents, servants, employees, and attorneys, and those persons in active concert or participation with them from engaging in the following conduct until the Court may fully adjudicate the merits of this action: from issuing further threats of prosecution against craigslist or its officers and employees in relation to content posted by third parties on craigslist's website and from initiating or pursuing any such prosecution.

Absent immediate court intervention, Defendant McMaster's threats of imminent criminal investigation and prosecution of craigslist and its management have and will continue to: (a) violate the rights of craigslist and its management, as the providers of an interactive computer service, to be free from liability and the burdens of litigation with respect to allegedly unlawful content posted by third parties on its website under the Communications Decency Act, 47 U.S.C. § 230 ("Section 230"); (b) violate the free speech rights of craigslist and its users in violation of the First Amendment of the United States Constitution, and (c) unduly burden interstate commerce in violation of the Commerce Clause of the U.S. Constitution.

This motion is based on the argument herein, the declarations of Jim Buckmaster ("Buckmaster Decl."), E. Bart Daniel ("Daniel Decl.") and Joseph P. Griffith, Jr. ("Griffith Decl.") filed herewith, and the Complaint in this case. Proposed orders accompany this motion.

I. INTRODUCTION

This is an action for declaratory and injunctive relief pursuant to 42 U.S.C § 1983 and the Declaratory Judgment Act, 28 U.S.C. § 2201, brought by craigslist, Inc. ("craigslist" or "Plaintiff") to enjoin a threatened prosecution in violation of federal law and the U.S. Constitution and to obtain a declaration of the respective rights of the parties.

craigslist operates a popular Internet classified service used by tens of millions of Americans each month, generally free of charge, to find employment, housing, goods and services, friendship, romance, and local community information. Over 50 million Americans use craigslist each month, posting over 40 million classified ads in over 100 categories, generating over 20 billion page views per month. Although used overwhelmingly by well-intentioned, law-abiding citizens, like any means of communication, the craigslist website can be abused by third-parties in connection with crimes including prostitution, despite craigslist's best efforts to prevent such abuse. Buckmaster Decl. ¶ 2.

Defendant McMaster has recently made, and is continuing to make, direct and public threats to criminally prosecute craigslist and its management based on the alleged presence on the craigslist website of third-party ads or notices that, according to Defendant McMaster, solicit prostitution or other unlawful activity or contain pornographic images. Defendant McMaster first stated this threat in a letter addressed to craigslist that he posted on his website on May 5, 2009 and that he publicized in a press conference on that date. That letter stated that craigslist management would be subject to criminal investigation and criminal prosecution if it did not, by 5:00 p.m. on May 15, 2009, remove all categories and functions on the South Carolina-directed portions of the craigslist website that make it possible for third parties to post content soliciting prostitution or containing pornographic images.

As explained in detail below, both long before Defendant McMaster's public threat of prosecution on May 5 and since then, craigslist has engaged in a wide variety of voluntary actions to attempt to deter third persons from abusing its website by posting ads soliciting unlawful prostitution or containing other forms of unlawful content. These actions included, but were not limited to, special voluntary measures to control postings to the site's "erotic services" subcategory that craigslist announced in November 2008 in a joint statement signed by itself and 40 state attorneys general, including Defendant McMaster. These measures resulted in a dramatic drop in the number of postings to the "erotic services" subcategory.

On May 12, 2009, craigslist voluntarily announced and implemented an additional strategy to attempt to further deter third parties from posting ads soliciting unlawful prostitution or containing pornographic images in violation of craigslist's own content guidelines. Specifically, it voluntarily closed the "erotic services" subcategory and it established a new "adult services" subcategory with an entirely new posting procedure. Unlike all of the other categories and subcategories of the craigslist website, for the new "adult services" subcategory craigslist has interposed an advance, manual screening process under which every proposed ad is individually reviewed to test its compliance with craigslist's posting policies, which prohibit ads soliciting illegal conduct such as prostitution as well as pornographic images. Proposed ads deemed to be out of compliance will not be posted. craigslist has taken these many voluntary actions to deter abuse of its website as a matter of good corporate citizenship, and not because it has any legal obligation to do so. In fact, both a federal statute, 47 U.S.C. § 230, and the First

Amendment to the United States Constitution, generally prohibit imposing liability on an Internet forum such as craigslist for unlawful content posted by third parties.

Despite craigslist's legal immunity from criminal or civil liability under State law for unlawful third-party content on its website, and despite the numerous good-faith actions that craigslist has voluntarily taken to deter abuse of its service by third parties notwithstanding its legal immunity, Defendant McMaster has persisted in threats to criminally prosecute craigslist on the basis of third-party content appearing on the craigslist website. Specifically, just minutes after his unilaterally imposed deadline of 5:00 p.m. on May 15, Defendant McMaster issued the following statement on the public website of the Attorney General's office:

> "As of 5:00 p.m. this afternoon, the craigslist South Carolina site continues to display advertisements for prostitution and graphic pornographic material. This content was not removed as we requested. We have no alternative but to move forward with criminal investigation and potential prosecution."

Given Defendant McMaster's persistent and continuing public threats, craigslist is presently faced with the untenable choice of either completely shutting down all portions of its website that are directed at South Carolina or else putting itself and its management at risk of imminent criminal prosecution. craigslist is entitled to immediate injunctive and declaratory relief preventing Defendants from continuing to threaten craigslist and its management with criminal prosecution, because those threats in and of themselves do, and any following through on those threats would, violate craigslist's fundamental rights under 47 U.S.C. § 230, the First Amendment to the U.S. Constitution, and the Commerce Clause of the U.S. Constitution.

II. STATEMENT OF FACTS

The craigslist Service

craigslist originated in San Francisco, California, in 1995. It grew from an email list created by Craig Newmark to share information about events in and around the San Francisco

Bay Area with his friends and co-workers. It has steadily gained in popularity and scope as a platform for free local classified ads and discussion forums. Buckmaster Decl. ¶ 3.

craigslist incorporated in 1999. It remains headquartered in San Francisco. Buckmaster Decl. ¶ 4. craigslist has approximately thirty employees who work out of offices located in the Inner Sunset neighborhood of San Francisco. The computer servers on which the craigslist website operates are located primarily in San Francisco and Phoenix, Arizona. Buckmaster Decl. ¶ 5. Today, the craigslist website – www.craigslist.org – is world renowned. It provides largely free, localized, online classified ads and discussion forums in over 570 cities in 50 countries worldwide, and it is one of the most visited websites in the world. It recently ranked 7th overall among internet companies in terms of English-language page views served. Buckmaster Decl. ¶ 6.

The craigslist service is organized into separate websites dedicated to particular localities. Presently, craigslist maintains separate websites for more than 300 cities, towns and regions in the United States. There are six such websites for South Carolina — one each for Charleston, Columbia, Florence, Greenville/Upstate, Hilton Head, and Myrtle Beach. The classified ads and other postings available on craigslist are created entirely by the site's users. In other words, the people who use the service write the material that they post. Buckmaster Decl. ¶ 7. Users have a choice of categories and subcategories on the website within which to post an ad or notice, including "community," "personals," "discussion forums," "housing," "for sale," "services," "resumes," "events," and "jobs." Buckmaster Decl. ¶ 8.

In general, users of craigslist do not pay to post ads or notices. The exceptions are (1) job ads in certain cities and broker apartment listings in New York City, for which a per-ad posting fee is charged; (2) ads in the recently terminated erotic services subcategory, for which craigslist, starting in late 2008, required a nominal fee charged to a valid credit card, a fee suggested to craigslist by law enforcement officials as a way to further encourage compliance with site guidelines and to make it easier for law enforcement officials to identify and apprehend anyone misusing the service in connection with unlawful activity (with 100% of net revenues to be donated to charity); and (3) ads in the newly created adult services category, for which a fee of $10 per posting is charged, again via valid credit card, to encourage compliance with site guidelines, for law enforcement tracking purposes, and to help defray the costs associated with this new category. Buckmaster Decl. ¶ 9.

craigslist also provides a variety of topical discussion areas which comprise a national forum where users of craigslist throughout the world may participate in dialogues encompassing numerous topics of public interest. Buckmaster Decl. ¶ 10. The postings on craigslist may be viewed entirely for free by any person with Internet access. Buckmaster Decl. ¶ 11.

All usage of craigslist is subject to craigslist's detailed Terms of Use, which are readily available to all users through prominently displayed links throughout the site. *See* Complaint, Exhibit A. To post any ad, a user must first affirmatively declare his or her acceptance of these Terms of Use by clicking an "ACCEPT" button located below a full-text display of the agreement. Buckmaster Decl. ¶ 12.

Among other things, these Terms of Use explicitly prohibit the posting or making available of any content that is "unlawful" or that "advertises any illegal service," including in particular "any offer or solicitation of illegal prostitution." The Terms of Use further explicitly prohibit posting of any material "that is pornographic or depicts a human being engaged in actual sexual conduct." Buckmaster Decl. ¶ 13. To promote compliance with its Terms of Use, craigslist employs various additional self-regulatory measures, including automated filters that block ads containing words or phrases that are associated with problematic content and a community flagging system that encourages users to "flag" inappropriate ads for removal. In addition, as described below, for certain particular categories, including the now-terminated "erotic" services subcategory and the newly-created "adult services" category, craigslist has implemented additional, targeted deterrent measures. Buckmaster Decl. ¶ 14.

The Former Erotic Services Subcategory of the craigslist Website

Until very recently, one of the "services" subcategories of the craigslist website was titled "erotic." That subcategory was established several years ago at the request of craigslist users so that legal escort services, massage workers, exotic dancers, erotic phone lines and other services whose ads often contain adult content (and who also advertise in many other media outlets in South Carolina and elsewhere) would have a dedicated area in which to post their ads, and so that they would no longer post such ads in various other sections of the site. Buckmaster Decl. ¶ 15.

Besides being common practice among all manner of classifieds services for decades, there are multiple advantages to having such a specially-zoned area for this class of lawful ads. Before the erotic services subcategory was established, craigslist users had been posting such ads to craigslist's "personal" categories, to various other "services" categories, and to other sections of the website. Having a separate subcategory for such ads insulates those in the community who are not interested in reading them. It also allows craigslist to target special measures at persons who post ads of this nature, in order to deter them from crossing the line between legal and illegal content. Buckmaster Decl. ¶ 16.

Newspaper classifieds, alternative weeklies, the telephone yellow pages, and many other print media regularly feature escort and sensual massage ads similar to those on craigslist and have done so for decades. Buckmaster Decl. ¶ 17. Popular mainstream search engines with "image" search features, which, unlike craigslist, are intended for persons of all ages, can search the worldwide web and rapidly locate extensive graphic materials with explicit pornographic content. Further, such search engines typically host these images on their own servers, and then make them available to anyone typing in a relevant query, and in fact will sometimes serve up such images in response to queries that are wholly unrelated. Buckmaster Decl. ¶ 18.

craigslist's Voluntary Measures to Combat Illegal Activity in the "Erotic" Subcategory

Over time, craigslist adopted a series of special measures to attempt to prevent misuse of its website for the purpose of posting ads to the site's erotic services subcategory that violate craigslist's Terms of Use. One of these measures was a detailed warning screen for the "erotic" subcategory. The warning screen required all users wishing to view the third-party content posted in this subcategory to confirm that the following five items were true before being allowed access to the subcategory, as follows:

> "Unless **all** of the following points are true, please use your "back" button to exit this part of craigslist:
> 1) I am at least 18 years old.
> 2) I understand 'erotic services' may include adult content.
> 3) I agree to flag as "prohibited" anything illegal or in violation of the craigslist terms of use. This includes, but is not limited to, offers for or the solicitation of prostitution.
> 4) I agree to report suspected exploitation of minors to the appropriate authorities.[1]
> 5) By clicking on the links below, I release craigslist from any liability that may arise from my use of this site."

Buckmaster Decl. ¶ 19. *See* Complaint, Exhibit B.

The warning screen for the now-terminated erotic services subcategory further stated, "Human trafficking and exploitation of minors are not tolerated - any suspected activity will be reported to law enforcement." Buckmaster Decl. ¶ 20.

Although craigslist as a whole is designed for adult users, the warning screen went on to state that "craigslist has implemented the PICS content labeling system to assist parents and

[1] This sentence included a "link" to contact information for the National Center for Missing & Exploited Children, National Human Trafficking Resource Center, National Child Exploitation Coordination Centre (Canada), and various law enforcement agencies in several different states.

others who may be interested in content filtering," and provided a link to information about how to use such filtering. Buckmaster Decl. ¶ 21.

In addition, in order to post any ad to the erotic services subcategory, users were first required to read and affirmatively agree to a special set of guidelines. These guidelines read as follows:

> "**YOU MUST OBSERVE THE FOLLOWING GUIDELINES WHEN POSTING IN EROTIC SERVICES**
>
> **ADS IN VIOLATION OF THESE GUIDELINES OR OUR TERMS OF USE ARE SUBJECT TO REMOVAL WITHOUT REFUND**
>
> 1. **"Erotic Services," like all categories on craigslist, may be used only for advertising LEGAL services.**
> When using craigslist, you agree to abide by the craigslist Terms of Use, which forbid posting, emailing or otherwise making available content that is unlawful, obscene, or which advertises illegal services.
>
> 2. **Do NOT suggest or imply an exchange of sexual favors for money – ads that do so are subject to removal without refund. . . .**
>
> 3. **Do NOT attempt to avoid detection of forbidden language by using spelling variations or text in images – ads that do so are subject to removal without refund. . . .**
>
> 4. **Do NOT include obscene images with your posting – ads containing obscene images are subject to removal without refund.**
> If you're not sure whether or not a particular image is obscene, do not post it.
>
> **If you are unable to follow these guidelines, do not post on craigslist.**
>
> Ads in violation of our Terms of Use or these guidelines are subject to removal without refund.
>
> craigslist may supply information about your identity to law enforcement officers in response to legal subpoena.
>
> I have read these guidelines and will abide by them – proceed with erotic services."

Buckmaster Decl. ¶ 22. *See* Complaint, Exhibit C.

Beginning in March of 2008, craigslist has consulted extensively with U.S. state attorneys general, including Defendant McMaster, as well as with other local law enforcement officials, concerning abuse of the craigslist website by persons attempting to solicit or offer prostitution. During such consultations, craigslist has repeatedly reaffirmed that it deplores such abuse and reiterated its continuing commitment to provide law enforcement officials with information upon appropriate request for the prosecution of persons engaging in and facilitating criminal activity. Buckmaster Decl. ¶ 23.

In November 2008, craigslist voluntarily implemented still more special measures in an effort to deter wrongdoers from posting ads soliciting or offering prostitution in the erotic services subcategory. These additional voluntary measures grew out of cooperative discussions between craigslist and representatives of 40 State attorneys general (including Defendant McMaster) and the National Center for Missing and Exploited Children (NCMEC) and were announced in a joint statement, dated November 6, 2008, that was signed by craigslist and 40 other State attorneys general, and NCMEC.. Buckmaster Decl. ¶ 24. *See* Complaint, Exhibit D.

These additional special measures for the erotic services subcategory included the following:

> A. Telephone Number Verification: In order to post in the "erotic" subcategory, a user was required to provide a working phone number. This phone number was verified by having craigslist systems automatically transmit a numeric code to the user via telephone call or text message to the telephone number provided by the user. To complete the posting process, the user had to type that numeric code into a form on the craigslist website. Thereafter, craigslist retained in its records such user-provided telephone number so that they could be (a) used by craigslist to block subsequent postings by users found to have violated the Terms of Use, and (b) made available to law enforcement personnel pursuant to proper legal process in conjunction with actual or suspected unlawful third-party conduct relating to particular postings.
>
> B. Credit Card Verification: craigslist also required users to submit a valid credit card credential and pay a $5 fee in order to post an ad in the "erotic" subcategory. craigslist kept this information is kept on file as well so that it could be made available to law enforcement pursuant to proper legal process.
>
> C. Keyword Filtering: craigslist also used electronic filtering to identify and block certain inappropriate words that it considered more likely to be associated with

> inappropriate postings to the "erotic" subcategory. During the week of April 23, 2009, keyword filters blocked 26% of ads submitted to the "erotic" subcategory in U.S. cities. craigslist voluntarily continued to develop, test and implement new technologies designed to identify and address attempts by abusive third parties to circumvent keyword filters.

Buckmaster Decl. ¶ 25.

In addition, in or about April of 2009, craigslist implemented measures to facilitate blocking inappropriate pornographic images from being posted to the erotic services subcategory in violation of its Terms of Use. These measures provided for preventing images that come to the attention of craigslist and found to be in violation of craigslist's Terms of Use from being re-posted. Buckmaster Decl. ¶ 26.

Based upon the measures that craigslist jointly announced with Defendant McMaster and other attorneys general, the overall number of ads that users posted to the erotic subcategory on the craigslist website for U.S. cities decreased by over 80%. Buckmaster Decl. ¶ 27. All of the foregoing measures directed at deterring abuse of the erotic services subcategory remained in effect until that subcategory was shuttered on May 12, 2009, as described below. Buckmaster Decl. ¶ 28.

Further Changes to the craigslist Website to Deter Inappropriate Third-Party Ads

On May 12, 2009, craigslist voluntarily undertook still further measures to deter abuse of its website by persons posting ads in violation of its Terms of Use. In particular, on that date, craigslist announced and took the following steps:

- craigslist immediately stopped accepting new postings to the erotic services subcategory on all portions of its website directed at localities within the United States, including the six local websites provided for areas in South Carolina. It further announced that the erotic services subcategory would be terminated altogether within seven days (i.e., by May 20, 2009) after all ads previously posted to that subcategory reached their normal seven-day expiration date.

- craigslist introduced and opened a new subcategory, called "Adult Services" within the services section of its local websites in the United States, including those for South Carolina. While this new subcategory operates with many of the special deterrent

> measures craigslist previously employed for the erotic services subcategory (including special warnings, automatic filtering mechanisms, telephone verification, and credit card verification), it also employs one key additional measure: Each new proposed posting to the Adult Services subcategory is manually reviewed before it can appear on the website in order to ensure compliance with craigslist's posting guidelines and Terms of Use.

Buckmaster Decl. ¶ 29.

Defendant McMaster's Unconstitutional Threats

The cumulative effect of all of these measures has been dramatic, such that on May 18, 2009, for the "adult services" and soon-to-be-retired "erotic services" sections combined, across all cities in South Carolina, there were a total of 40 ads, all of which complied with craigslist's Terms of Use. That constitutes 40 ads out of a total of 334,180 currently listed on craigslist's South Carolina websites. The rest of those 334, 180 ads comprise a thriving marketplace for South Carolinians, offering jobs, housing, automobiles, for sale items, local services, community information, event listings, and just about everything else they may need in their everyday lives. Buckmaster Decl. ¶ 30.

Despite craigslist's numerous voluntary actions and extensive cooperation with the State attorneys general and other law enforcement agencies, all aimed at the common goal of curtailing third-party abuse of craigslist's website, Defendant McMaster has recently threatened, and at this moment is continuing to threaten, to prosecute craigslist and its management based on allegedly unlawful content that third parties have posted on the craigslist website. Buckmaster Decl. ¶ 31. On May 5, 2009, Defendant McMaster, joined by a number of South Carolina law enforcement officials including Anderson County Sheriff John Skipper, Pickens County Sheriff David Stone, and Oconee County Sheriff James Singleton, held a press conference relating to craigslist. Daniel Decl. ¶ 2.

At the press conference, Defendant McMaster threatened craigslist with criminal investigation and prosecution if certain types of third-party content were not removed and blocked from the South Carolina-directed portions of craigslist's website. During this press conference, Defendant McMaster referenced a letter he had addressed to craigslist's CEO, Jim Buckmaster. The same day, Defendant McMaster prominently posted this letter on his office's official website, along with a press release about his threat. Daniel Decl. ¶ 3.

In particular, Defendant McMaster's May 5, 2009 letter to Mr. Buckmaster stated "please be advised that the craigslist management may be subject to criminal investigation and prosecution by this office if the portions of [craigslist's] site dedicated to South Carolina and its municipal regions and which contain categories for and functions allowing for the solicitation of prosecution and the dissemination and posting of graphic pornographic material are not permanently removed on or before 5:00pm EST, the close of business Friday, May 15, 2009." Buckmaster Decl. ¶ 32; Daniel Decl. ¶ 4. *See* Complaint, Exhibit E.

The following day, on May 6, 2009, a news article displayed on the website of *The State* newspaper (TheState.com) reported that "[Defendant McMaster] threatened Tuesday to charge Craigslist's [sic] chief executive, contending the popular Internet classified ad service company hasn't done enough to stop solicitation for prosecution and obscenity on its Web site." According to that article, Defendant McMaster told *The State* that, to his knowledge, South Carolina is the first state to explore the possibility of criminal charges against CEO Jim Buckmaster and other top officers of the San Francisco-based company. The article also reported that Defendant McMaster had stated that he will seek to charge Mr. Buckmaster and other company officials under state prostitution or obscenity laws. Daniel Decl. ¶ 5. *See* Complaint, Exhibit F.

On May 13, 2009, a lawyer representing craigslist met with officials within of the Office of the Attorney General of South Carolina to discuss the additional voluntary measures craigslist had implemented the previous day — including the closure of the erotic services subcategory and the employment of manual advance review of new postings to the newly opened adult services category — and to discuss Defendant McMaster's public threat to conduct a criminal investigation and prosecution of craigslist's management. Among other things, craigslist's lawyer explained at that meeting that federal law, including 47 U.S.C. § 230 and the First Amendment, shield craigslist from any such prosecution. Daniel Decl. ¶ 6.

Later that same day, TheState.com displayed an article reporting that Defendant McMaster will not withdraw his "threat of criminal prosecution." The article reported that Defendant McMaster derided craigslist's latest efforts as "nothing" and quoted Defendant McMaster as saying, "The only agreement we could have is they block everything (related to prostitution and obscenity) in South Carolina." Daniel Decl. ¶ 7. *See* Complaint, Exhibit G.

On May 14, 2009, craigslist's counsel informed Defendant McMaster by letter of the extensive measures craigslist had undertaken and set forth the legal principles barring any potential prosecution of craigslist. Daniel Decl. ¶ 8. *See* Complaint, Exhibit H.

On May 15, 2009, Deputy Attorney General John McIntosh replied to craigslist's letter of May 14 expressing his office's concern about "the facilitation of prostitution in South Carolina" and assuring craigslist that "[p]rior to any prosecution in which this office is involved, you will certainly be allowed a reasonable opportunity to respond." Daniel Decl. ¶ 9. *See* Complaint, Exhibit I. Later on May 15, 2009, just a few hours after craigslist's counsel received McIntosh's letter, Defendant McMaster's office posted on its official website at www.scattorneygeneral.com the following announcement:

> "As of 5:00 p.m. this afternoon, the craigslist South Carolina site continues to display advertisements for prostitution and graphic pornographic material. This content was not removed as we requested. We have no alternative but to move forward with criminal investigation and potential prosecution."

Daniel Decl. ¶ 10. *See* Complaint, Exhibit J.

On May 15, 2009, the AP newswire reported: "The South Carolina attorney general says the clock for Craigslist to clean up its online classified site starts Friday evening, and he will prosecute executives if prostitution ads from the state remain on the site." The newswire quoted Defendant McMaster as follows: "'We were hoping at 5 p.m. all those ads would be gone, and we'd be able to move on to other things,'" [McMaster] said. "'Because they're not off, we won't be able to end our monitoring and scrutiny. … All we're asking Craigslist to do is take the prostitution ads off its Web site.'" Daniel Decl. ¶ 11. *See* Complaint, Exhibit K.

On May 16, 2009, theState.com reported: "Attorney General Henry McMaster has launched his own investigation of Craigslist for possible prostitution and pornography as his own deadline to block such classified ads passed Friday afternoon. 'We will have an active investigation in the office into Craigslist,' McMaster said. 'This content was not removed as we requested. We have no alternative.'" The article further reported: "McMaster, widely believed to be a GOP candidate for governor, said he is unaware of any other attorney general who is considering criminal charges. He cited aiding and abetting prostitution, obscenity and conspiracy as possible offenses. Craigslist executives could be tried in their absence and face extradition to South Carolina after a third offense of aiding in prostitution." Daniel Decl. ¶ 12. *See* Complaint, Exhibit L.

Defendant McMaster also participated in an interview with Fox News on May 16, 2009, wherein he stated:

> "We opened an investigation at 5:01 on Friday, as promised. . . . We are preparing for a prosecution. We are investigating. We are moving forward. . . . . The #1 defendant is Mr. Jim Buckmaster, who is the man in charge of craigslist.. . . . craigslist is a big promoter and facilitator of prostitution."

Daniel Decl. ¶ 13. A video recording of this May 16 interview with Fox News can be found at: www.palmettoscoop.com/2009/05/18/mcmaster-moves-forward-with-craigslist-case/.

On May 18, 2009, the *Wall Street Journal*, in its online edition, reported:

"On May 5, the Palmetto State's Attorney General Henry McMaster threatened to

> prosecute executives form the online classifieds site [craigslist], if ads on the site play a role in a prostitution case in South Carolina.
>
> Then last week, Craigslist announced steps to introduce a new review system for every single adult services listing on the site. It did this after consulting with the attorneys general from several states, who complained the site had become a preferred way for prostitutes to advertise their services.
>
> McMaster wasn't satisfied. On Friday, he reiterated his threat, saying the South Carolina portion of the site still displayed ads for prostitution. 'We have no alternative but to move forward with criminal investigation and potential prosecution, McMaster wrote on his site.'"
>
> [. . .]
>
> On Monday afternoon, McMaster's communications director Mark Plowden said that the 'matter is under criminal investigation,' and that the AG's statement from Friday was still current."

Daniel Decl. ¶ 14. *See* Complaint, Exhibit M.

On May 18, in an interview on the Fox Business network, Defendant McMaster again stated that he is conducting an active criminal investigation against craigslist for aiding and abetting prostitution, and likened craigslist "to a hotel or motel owner that knows prostitution is going on on their premises and fails to do anything about it especially after having been told." Daniel Decl. ¶ 15. A video recording of this May 18 interview with Fox Business can be found at: http://www.foxbusiness.com/search-results/m/22316480/ag-to-craigslist-clean-up-or-else.htm#q=mcmaster.

As a practical matter, the only way for craigslist to assure compliance with Defendant McMaster's demands would be to shut down completely all portions of its website dedicated to the State of South Carolina. This is so because McMaster has demanded that, in order to avoid criminal investigation and prosecution, craigslist must prevent third parties from posting ads or notices that may contain material McMaster has identified as illegal, and the only way to assure that such material is not posted would be to shut down entirely all portions of the site dedicated to the state of South Carolina. Buckmaster Decl. ¶ 33.

In fact, given the generally open architecture of the craigslist website, which open architecture is manifestly one of the greatest success stories across the entire Internet, and from which open architecture the people of South Carolina have greatly benefited and continue to benefit, it is possible today, despite craigslist's best efforts, for any person with Internet access, whether inside or outside of South Carolina, to create and successfully post to any category or subcategory available on the South Carolina portions of the website (other than the new adult services category, which is subject to manual review) an ad that solicits prostitution or contains a graphic pornographic image. Accordingly, the only way for craigslist to assure that material of that sort is not posted on the South Carolina craigslist websites would be to shut down those websites entirely. Buckmaster Decl. ¶ 34.

The craigslist South Carolina websites provide a thriving free marketplace for South Carolinians in search of jobs, housing, automobiles, for sale items, local services, community information, event listings, and just about everything else they may need in their everyday lives. Mr. McMaster is threatening to criminally prosecute craigslist if it does not shut down all services for South Carolina, so as to physically prevent local craigslist users or anyone else from posting an ad that he might allege to be illegal. Buckmaster Decl. ¶ 35.

Given the specter of criminal prosecution of craigslist and its management arising from McMaster’s threats, and given the persistence of those threats notwithstanding craigslist’s recent announcement and implementation of new measures — including termination of the “erotic” subcategory and establishment of a new “adult services” category in which all postings are being subjected to advance manual review — craigslist is presently faced with the choice of either shutting down completely all portions of its website upon which the people of South Carolina depend for their everyday needs, or putting itself and its management at risk of criminal prosecution by McMaster. Buckmaster Decl. ¶ 36.

Counsel for craigslist contacted the Defendants on May 20, 2009 by email and/or facsimile letter to inform them of craigslist's intent to file a complaint in this action and immediately seek a temporary restraining order and preliminary injunction. Counsel for craigslist indicated that craigslist would present its motion for a temporary restraining order and preliminary injunction after 11:00 a.m. on May 20th, 2009, and provide a copy of the summons and complaint and the motion for temporary restraining order and preliminary injunction to the Defendants as soon as the pleadings were available. Counsel for craigslist advised them that if Defendants would agree to the terms of the proposed orders, craigslist would delay for three business days seeking the temporary restraining order and preliminary injunction. Defendants have not agreed to the proposed orders as of the filing of this motion. Griffith Decl. ¶ 2.

III. ARGUMENT

A. Standards for Issuance of Temporary Restraining Order and Preliminary Injunction

In determining whether to grant injunctive relief prior to trial, the Court must consider four factors: (1) the plaintiff's likelihood of success in the underlying dispute between the parties; (2) whether the plaintiff will suffer irreparable injury if the injunction is not issued; (3) the injury to the defendant if the injunction is issued; and (4) the public interest. *Scotts Co. v. United Indus. Corp.,* 315 F.3d 264, 271 (4th Cir. 2002); *Blackwelder Furniture Co. v. Seilig Manufacturing Co.,* 550 F.2d 189, 193 (4th Cir. 1977). A strong showing of a likelihood of irreparable injury substantially lessens the plaintiffs' need to demonstrate the likelihood of success on the merits. *Maryland Undercoating Co. v. Payne*, 603 F.2d 477, 481 (4th Cir. 1977). The strong likelihood of success on the merits likewise reduces the need to meet the other requirements. *Id.*

In this case, an emergency temporary restraining order and a preliminary injunction are both necessary and appropriate because craigslist has a strong likelihood of prevailing on its claims and would suffer imminent and irreparable harm if such interim relief were to be denied. Defendant McMaster, in contrast, will not be meaningfully harmed by the issuance of the requested temporary restraining order and preliminary injunction, and this relief will best serve the public interest and federal policies embodied in Section 230, the First Amendment, and the Commerce Clause.

B. The Standards for Issuing a Temporary Restraining Order and a Preliminary Injunction are Satisfied Here

The standards for granting interim injunctive relief are easily satisfied in this case.

1. craigslist Is Likely to Succeed on the Merits

For the reasons discussed below, craigslist has a substantial likelihood of proving that Defendant McMaster's threatened criminal prosecution is barred by 47 U.S.C. § 230 and would violate the First and Fourteenth Amendments and the Commerce Clause of the United States Constitution. Each of these claims entitles craigslist to injunctive relief.

a. Defendant's Threatened Prosecution Violates 47 U.S.C. § 230

Under the Communications Decency Act, 47 U.S.C. § 230, neither craigslist nor its personnel may be subject to legal proceedings or held criminally or civilly liable under State law for allegedly unlawful content posted to the craigslist website by third-party users of the site. Defendant McMaster's threatened criminal prosecution, which is based entirely on the presence on the craigslist site of allegedly unlawful third-party ads, is therefore barred by federal law.

The key operative provision of Section 230 declares that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. § 230(c)(1). The statute further provides that "[n]o cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section." 47 U.S.C. § 230(e)(3).

Courts across the country, including the Court of Appeals for the Fourth Circuit, have consistently declared that Section 230 broadly immunizes providers of interactive computer services from liability under State law for the dissemination of third-party content. Subject to certain narrow exceptions not implicated here, Section 230 immunity exists whenever (1) the defendant claiming immunity is "a provider . . . of an interactive computer service," (2) the allegedly unlawful content was "provided by another information content provider," and (3) the plaintiff's claims seek to "treat[]" the defendant as the "publisher or speaker" of that information. 47 U.S.C. § 230(c)(1). *See generally Universal Communication Systems, Inc. v. Lycos, Inc.*, 478 F.3d 413, 418 (1st Cir. 2007); *Ben Ezra, Weinstein, & Co., v. America Online, Inc.*, 206 F.3d 980, 984-85 (10th Cir. 2000), *cert. denied*, 531 U.S. 824.

In the seminal decision construing Section 230(c)(1), the U.S. Court of Appeals for the Fourth Circuit held that "Section 230 . . . plainly immunizes computer service providers . . . from liability for information that originates with third parties." *Zeran v. America Online, Inc.*, 129 F.3d 327, 328 (4th Cir. 1997) (Wilkinson, C.J.), *cert. denied*, 524 U.S. 937 (1998). The *Zera* court further ruled that "lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions — such as deciding whether to publish, withdraw, postpone or alter content" — necessarily "treats" the defendant as a "publisher" of that content and therefore "are barred." *Id.* at 330, 333. Courts of Appeals across the country have uniformly followed *Zeran*'s broad construction of the statute. *See, e.g., Doe v. MySpace, Inc.*, 528 F.3d 413, 418 (5th Cir. 2008) ("Courts have construed the immunity provisions in § 230 broadly in all cases arising from the publication of user-generated content"); *Lycos, Inc.*, 478 F.3d at 419 ("[W]e too find that Section 230 immunity should be broadly construed"); *Carafano v. Metrosplash, Inc.*, 339 F.3d 119, 1123 (9th Cir. 2003) ("§ 230(c) provides broad immunity for publishing content provided primarily by third parties"); *Green v. America Online, Inc.*, 318 F.3d

465, 471 (3d Cir. 2003) ("By its terms, § 230 provides immunity to AOL as a publisher or speaker of information originating from another information content provider"); *Ben Ezra*, 206 F.3d at 984-85 (Section 230 "creates a federal immunity to any state law cause of action that would hold computer service providers liable for information originating with a third-party").

Countless federal district courts and State appellate and trial-level courts also have concluded that Section 230 broadly immunizes providers of interactive computer services from liability for the dissemination of third-party content.[2] Congress itself, in enacting legislation extending the reach of Section 230 to a new category of service providers, has explicitly observed that "[t]he courts have correctly interpreted section 230(c)." H.R. Rep. No. 107-449, at 13 (2002) (specifically endorsing *Zeran* and its progeny).

The breadth of immunity under Section 230, and in particular its protection against all manner of legal claims based on third-party content, is well illustrated by a recent decision of the Seventh Circuit in a case involving craigslist, *Chicago Lawyers' Committee for Civil Rights Under Law, Inc. v. craigslist, Inc.*, 519 F. 3d 666 (7th Cir. 2008) ("CLC"). The plaintiff in that case sought to hold craigslist liable under the Fair Housing Act, 42 U.S.C. § 3604(a), for allegedly discriminatory housing ads posted by users on the craigslist website. In affirming dismissal, the Seventh Circuit (Easterbrook, J.) noted that services like craigslist are, in many respects, "like common carriers such as telephone services" — they do not read the messages they transmit on their systems. 519 F.3d at 668. The court recognized that requiring craigslist to review each and every ad posted on its service, such as the CLC demanded in that case and Defendant effectively demands here, is neither practical nor effective. *Id.* at 669. The Seventh

[2] *See, e.g., Goddard v. Google, Inc.*, 2008 WL 5245490 (N.D. Cal. 2008); *Whitney Information Network, Inc., v. XCentric Ventures, LLC*, 2008 WL 450095 (M.D. Fla. 2008); *Doe v. SexSearch.Com*, 502 F.Supp.2d 719 (N.D. Ohio 2007), *aff'd on other grounds* 551 F.3d 412 (6th Cir. 2008); *Associated Bank-Corp. v. Earthlink, Inc.*, 2005 WL 2240952, at *4 (W.D. Wis. Sept. 13, 2005); *Morrison v. America Online, Inc.*, 153 F. Supp. 2d 930, 932-34 (N.D. Ind. 2001).

Circuit further concluded that craigslist was not obligated to review the ads, because Section 230 immunized craigslist from liability for the ads. Regardless of how the CLC characterized its action, it was seeking to hold craigslist liable for publishing the ads at issue in that case. *Id.* at 671. Indeed, in an analysis directly applicable to the present case, the Seventh Circuit rejected CLC's argument that craigslist should be held liable for causing the unlawful postings:

> Doubtless craigslist plays a causal role in the sense that no one could post a discriminatory ad if craigslist did not offer a forum. That is not, however, a useful definition of cause. One might as well say that people who save money "cause" bank robbery, because if there were no banks there could be no bank robberies. An interactive computer service "causes" postings only in the sense of providing a place where people can post. Causation in a statute such as [the Fair Housing Act] must refer to causing a particular statement to be made, or perhaps the discriminatory content of a statement. That's the sense in which a non-publisher can cause a discriminatory ad, while one who causes the forbidden content may not be a publisher. Nothing in the service craigslist offers induces anyone to post any particular listing or express a preference for discrimination; . . . . If craigslist "causes" the discriminatory notices, then so do phone companies and courier services (and, for that matter, the firms that make the computers and software that owners use to post their notices online), yet no one could think that Microsoft and Dell are liable for "causing" discriminatory advertisements.

Id. at 671-72. The Seventh Circuit thus held that "given § 230(c)(1) [the CLC] cannot sue the messenger just because the message reveals a third party's plan to engage in unlawful [conduct]." *Id.* at 672. The same conclusion applies here.

The Ninth Circuit's *en banc* decision in *Fair Housing Council v. Roommates.com,* 521 F.3d. 1157, 1174 (9th Cir. 2008), issued shortly after the Seventh Circuit's *CLC* decision, also directly and unequivocally holds that a website operator may not be liable for unlawful ads posted by its users, except in circumstances (not present here) where the website operator structures its site so as to directly and necessarily cause its users to include unlawful statements in their postings. In *Fair Housing Council*, a portion of the website at issue required users to answer multiple choice questions that necessarily led to the generation of unlawful content (i.e., statements of unlawful preferences in housing ads). *Id.* at 1165. The website also included an open-ended "Additional Comments" feature in which users could include content, some of which also was allegedly unlawful. While the court held that Section 230 did not immunize Roommates.com with respect to the allegedly unlawful content dictated by the multiple choice questions, all eleven members of the *en banc* court expressly held that everything that users chose to include in the "Additional Comments" section was created and developed entirely by the users themselves and that Section 230(c)(1) accordingly immunized the site operator from liability for any unlawful preferences expressed in that section. *Id.* at 1174-75.

There is no question that the three elements for Section 230(c)(1) immunity are met in the circumstances of this case. *First,* craigslist is clearly a provider of an interactive computer service within the meaning of 47 U.S.C. § 230(c)(1) and § 230(f)(2) (" 'interactive computer service' means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server"). *See CLC,* 519 F.3d at 671 (treating craigslist as an "interactive computer service"); *Fair Housing Council,* 521 F.3d. at 1162, n.6 ("Today, the most common interactive computer services are websites"); *Lycos, Inc.,* 478 F.3d at 419.

Second, all of the content appearing on the craigslist website that is the subject of Defendant McMaster's threatened criminal prosecution was created and developed by third-parties and therefore constitutes "information provided by another information content provider" within the meaning of 47 U.S.C. § 230(c)(1). Section 230 defines "information content provider" as "any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service." 47 U.S.C. § 230(f)(3).

Craigslist's designation of a subcategory for erotic or adult ads does not alter this conclusion. Because there are lawful ads that can be (and are) placed in that subcategory (*e.g.,* massage and escort services), the mere provision of the category does not itself amount to being responsible for the creation or development of ads for unlawful activities created by users, especially given that, as described above, craigslist has an express policy against posting of any such ads.[3] *See Whitney Information Network, Inc. v. Xcentric Ventures, LLC* 2008 WL 450095, *10 (M.D. Fla. 2008) ("the Court finds that the mere fact that Xcentric provides categories from which a poster must make a selection in order to submit a report on the ROR website is not sufficient to treat Defendants as information content providers of the reports about WIN that contain the 'con artists', 'corrupt companies', and 'false TV advertisements' categories"); *Gentry v. eBay, Inc.*, 99 Cal.App.4th 816, 832 (2002) (holding that eBay's provision of product categories did not render it responsible for ads created by users).

Third, Defendant McMaster's threatened prosecution of craigslist constitutes, and any action to follow through on such threat would constitute, "treat[ment]" of craigslist as the "publisher or speaker" of third-party content. Indeed, as courts have explained, except for a few narrow exceptions that are inapplicable here, *any* lawsuit that would impose liability on an interactive service provider for allegedly unlawful third-party information necessarily seeks to impose liability on the service provider as the "publisher or speaker" of that information. *See, e.g., Zeran*, 129 F.3d at 328 ("§ 230 creates a federal immunity to *any cause of action* that would make service providers liable for information originating with a third-party user of the service"); *Carafano*, 339 F.3d at 1124 ("Under § 230(c), . . . so long as a third party willingly provides the essential published content, the interactive service provider receives full immunity regardless of the specific editing or selection process").

[3] Indeed, imposing liability on craigslist for its creation of an erotic subcategory also would run afoul of a different provision of Section 230 — namely, subsection 230(c)(2), which states that a provider cannot be held liable for "an action taken in good faith to restrict access to or availability of material that the provider or user considers to be 'lewd, lascivious . . . or otherwise objectionable.'" As described above, *see supra* at 4-6, craigslist created this subcategory precisely to "restrict access to" adult or

Holding craigslist liable for the content of third-party postings would inevitably treat craigslist as a publisher because it would (1) put craigslist in the posture of the original poster, who is the "publisher," and (2) subject craigslist to a legal regime in which it would have to review, edit, and/or screen third-party content — quintessential publishing functions. *Zeran,* 129 F.3d at 330, 333 ("lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions — such as deciding whether to publish, withdraw, postpone or alter content" necessarily "treats" the defendant as a "publisher" of that content and therefore "are barred"); *Green*, 318 F.3d at 471 (any claim that a service provider "promulgat[ed] harmful content" and "fail[ed] to address certain harmful content" pertains to "decisions relating to the monitoring, screening, and deletion of content from its network — actions quintessentially related to a publisher's role"); *Ben Ezra*, 206 F.3d at 986 ("Congress clearly enacted §230 to forbid the imposition of publisher liability on a service provider for the exercise of its editorial and self-regulatory functions").

There can be no question that Section 230 applies to criminal prosecution under State law. *Voicenet Communications, Inc. v. Corbett*, 2006 WL 2506318, *4 (E.D.Pa. 2006) ("the plain language of the CDA provides internet service providers immunity from inconsistent state criminal laws"); *People v. Gourlay*, 2009 WL 529216, *3 (Mich. App. Mar. 1, 2009) ("Congress intended that no liability may be imposed under a state criminal law that is inconsistent with § 230"). *See also Doe v. America Online, Inc.*, 783 So.2d 1010, 1018 (Fla. 2001) (holding online intermediary immune from civil liability sought to be imposed under State criminal statutes prohibiting marketing and dissemination of child pornography).

Section 230's extension to prosecutions based on State criminal laws is evident from the statute's plain language, which provides:

sexually oriented material by zoning it off so that users may block it or otherwise avoid viewing it.

> Nothing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section. *No cause of action may be brought and no liability may be imposed under* ***any*** *State or local law that is inconsistent with this section.* 47 U.S.C. § 230(e)(3) (emphasis added).

"In interpreting statutory language, words are generally given their common and ordinary meaning." *Mapoy v. Carroll*, 185 F.3d 224, 229 (4th Cir. 1999). The word " 'any' is a term of great breadth." *United States v. Wildes*, 120 F.3d 468, 470 (4th Cir. 1997), *cert. denied*, 522 U.S. 1092 (1998). The Fourth Circuit has interpreted "any" to mean "all." *Mapoy*, 185 F.3d at 229, quoting *Black's Law Dictionary* 94 (6th ed. 1990) (defining "any" to mean "[s]ome; one out of many; an indefinite number," that depending on the context and subject matter of the statute, "may be employed to indicate 'all' or 'every' "). "Accordingly, the phrase 'any State or local law' includes civil and criminal laws." *Gourlay*, 2009 WL 529216 at *3. Thus, because Congress intended that no liability may be imposed under a State criminal law that is inconsistent with Section 230, Section 230 is clearly applicable here.

The fact that Section 230 immunity protects online intermediaries like craigslist from criminal prosecution under State law is further confirmed by the statute's inclusion of an exception for enforcement of *federal* criminal statutes. Subsection 230(e) is entitled "Effect on other laws." Sub-subsection (e)(1) provides that nothing in Section 230 "shall be construed to impair the enforcement" of certain federal statutes governing obscenity and the sexual exploitation of children, "or any other *Federal* criminal statute." 47 U.S.C. § 230(e)(1) (emphasis added). In other words, sub-subsection (e)(1) states that only prosecutions under federal criminal statutes will trump Section 230. Statutes should be interpreted to give effect, if possible, to every clause and word. *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (internal quotations omitted). To interpret Section 230 as inapplicable to all criminal laws would render the word "Federal" in sub-subsection (1) superfluous, in violation of this rule of statutory interpretation. *Voicenet*, 2006 WL 2506318, *4.

Moreover, if Congress had wanted State criminal statutes to be exempt from Section 230 immunity as well, it knew how to say so. For example, sub-subsection (e)(2) provides that nothing in Section 230 shall be construed to limit or expand "*any* law pertaining to intellectual property." 47 U.S.C. § 230(e)(2) (emphasis added). Sub-subsection (e)(4) provides that nothing in Section 230 shall be construed to limit the application of the ECPA "or *any similar State law*." 47 U.S.C. § 230(e)(4) (emphasis added). If Congress intended for all criminal statutes to be exempt from Section 230 immunity, it could have written sub-subsection (1) to cover "any criminal statute" or "any similar State criminal statute." Instead, sub-subsection (1) is limited to federal criminal statutes. *Voicenet*, 2006 WL 2506318, *4. When Congress includes particular language in one provision of a statute but omits it in another, courts generally presume that Congress acted intentionally and purposefully. *Duncan*, 533 U.S. at 173 (internal quotations omitted).

In sum, because craigslist is immune from both prosecution and liability for the activities that are the subject of Defendant McMaster's threat of criminal prosecution, craigslist is likely to prevail on its claim that the threatened prosecution violates 47 U.S.C. § 230.

b. Defendant's Threatened Prosecution Violates the First and Fourteenth Amendments of the United States Constitution

The practical effect on protected speech of Defendant McMaster's threatened prosecution cannot be overstated. Every day, literally thousands of individuals visit craigslist's South Carolina site and exchange information and ideas about politics, art, religion, hobbies, the law, and many other topics; they post housing and job opportunities; they advertise goods and services; and they share information about their local communities and schools. The breadth of the threatened prosecution would effectively force craigslist to shut down the entire site, and with it, the speech of this vast online community of users.

The First Amendment clearly prohibits this. *First*, Defendant McMaster's threatened prosecution amounts to an unlawful prior restraint on speech. As the Supreme Court has recognized, any scheme that "conditions[s] expression on a licensing body's prior approval of content 'presents peculiar dangers to constitutionally protected speech.'" *Thomas v. Chicago Park District*, 534 U.S. 316 (2002) (quoting *Freedman v. Maryland*, 380 U.S. 51, 57 (1965)). Accordingly, prior restraints on speech are specially disfavored by the First Amendment, and there is a "heavy presumption against [their] constitutional validity." *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971) (internal quotation marks omitted). A prior restraint is constitutionally invalid unless it is meets certain rigorous procedural requirements. *See Thomas*, 534 U.S. at 321 (restraint may be maintained only for a "specified brief period"; "expeditious judicial review" must be available; and "censor must bear the burden of going to court to suppress the speech and must bear the burden of proof once in court").

These strictures on prior restraints apply not only to formal licensing schemes, but also to *informal* actions by government officials that have the practical effect of censoring speech. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 67 (1963) ("informal censorship may sufficiently inhibit the circulation of publications to warrant injunctive relief"); *Drive In Theaters, Inc. v. Huskey*, 435 F.2d 228, 229 (4th Cir. 1970). In *Bantam Books*, the Supreme Court held that the actions of a State morality commission amounted to an unlawful prior restraint even though the commission only notified book publishers of objectionable material and had no power to apply formal legal sanctions. Noting that the commission often reminded publishers of its duty to make prosecution recommendations to the State attorney general, the Court observed that "[p]eople do not lightly disregard public officers' thinly veiled threats to institute criminal proceedings against them if they do not come around." *Id.* at 68. The Court concluded that as a practical matter, the commission's actions imposed a prior restraint on speech: "the Commission deliberately set about to achieve the suppression of publications deemed 'objectionable' and succeeded in its aim." *Id.* at 67. Because the State provided no procedure to judicially challenge or review the commission's determinations, the Court held the commission's activities unconstitutional.

The Fourth Circuit subsequently applied *Bantam Books* to enjoin a North Carolina sheriff who had mounted a campaign of threatening prosecution against any theater showing movies that were not rated suitable for general audiences. *Drive In Theaters*, 435 F.2d at 228. The court found no meaningful difference between the sheriff's repeated threats of prosecution and the system of informal censorship held unconstitutional in *Bantam Books*: "The only difference we see between the unlawful censorship activity of the [commission] and the censorship activity of Sheriff Huskey is that he was not subtle and his threats were not veiled." *Drive In Theaters*, 435 F.2d at 230.

Bantam Books and *Drive In Theaters* squarely control this case. Defendant McMaster's persistent threats of prosecution are plainly intended to silence craigslist and its users and operate as an unlawful prior restraint on the speech. He has singled out craigslist and repeatedly threatened, in public statements by his office and in the press, to criminally prosecute craigslist unless it takes measures that would drastically curtail protected speech on its website. Indeed, despite the actions craigslist has taken in response to the threats, he continues to hold the threat of prosecution over craigslist's head. And as in *Bantam Books* and *Drive In Theaters*, there are *no* procedural mechanisms available (short of this litigation) to allow craigslist to seek judicial review of the Defendant McMaster's decision to single out craigslist for threatened prosecution. Defendant McMaster's conduct is in all relevant respects identical to the conduct proscribed by *Bantam Books* and *Drive In Theaters*. It flatly violates the First Amendment.

Second, McMaster's threatened prosecution constitutes an overbroad content-based restriction on speech because it would effectively outlaw a vast amount of protected speech simply to redress (at most) a relative few instances of unprotected speech. Content-based restrictions are "presumptively invalid" and subject to the highest degree of scrutiny, *Ysursa v. Pocatello Educ. Ass'n*, 129 S. Ct. 1093, 1098 (2009), and will be sustained *only* if they are "necessary to serve a compelling state interest" and "narrowly drawn to achieve that end," *Perry Educ. Ass'n v. Perry Local Educators' Ass'n,* 460 U.S. 37, 45 (1983).

A restriction of this breadth is plainly not "narrowly tailored" to achieve any conceivable governmental interest here. At most, Defendants have an interest in policing the small amount of *unprotected* speech by certain users in craigslist's forums, such as ads for prostitution. But that speech is only a tiny fraction of all the speech that takes place on craigslist, nearly *all* of which is clearly protected by the First Amendment. Prohibiting the vast majority of protected speech by effectively shutting down the operation of the site is certainly not "narrowly tailored" to the objective of preventing relatively few instances of illegal speech. *See Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 255 (2002) ("the overbreadth doctrine prohibits the Government from banning unprotected speech if a substantial amount of protected speech is prohibited or chilled in the process"); *PSINet, Inc. v. Chapman*, 362 F.3d 227, 234 (4th Cir. 2004) ("The Constitution provides significant protection 'from overbroad laws that chill speech within the First Amendment's vast and privileged sphere.' " (quoting *Ashcroft*, 535 U. S. at 253)).

Finally, to impose criminal liability on craigslist, Defendants would have to establish, at a minimum, that craigslist knew of the third-party content and its allegedly unlawful nature. *Smith v. California,* 361 U.S. 147, 153-54 (1959) (First Amendment prohibits the imposition of criminal liability on an operator of an information clearinghouse for allegedly unlawful third-party content unless the operator specifically knew of such content and its unlawful nature). To allow otherwise would limit the amount of third-party postings to those which could be reviewed by craigslist. That, coupled with the fear of criminal liability, would restrict the public's access to forms of speech which the State could not constitutionally suppress directly. *Id.* at 154; *see also In re Grand Jury Subpoena: Subpoena Duces Tecum*, 829 F.2d 1291, 1298 (4th Cir. 1987) (broad subpoenas for obscene videotapes issued on expectation that vendors would "comply based on their imputed knowledge of the contents of their inventories would tend seriously to restrict the dissemination of books and movies that are not obscene"). "[S]uch a tendency to inhibit constitutionally protected expression . . . cannot stand under the Constitution." *Smith*, 361 U.S. at 155. The threatened prosecution therefore violates the First Amendment, and craigslist has a substantial likelihood of prevailing on the merits.

c. Defendant's Threatened Prosecution Violates the Commerce Clause of the United States Constitution

Defendant McMaster's threatened prosecution violates the Commerce Clause because it applies to certain activities that take place wholly outside of South Carolina and because it places burdens on interstate commerce that are excessive in relation to its local benefits.

The Commerce Clause of the U.S. Constitution limits the power of States to regulate interstate trade, *Quill Corp. v. North Dakota,* 112 S. Ct. 1904, 1911 (1992), and imposes two important restrictions relevant to this case.

First, "the Commerce Clause precludes the application of a State statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State." *Healy v. Beer Institute*, 491 U.S. 324, 336 (1989). Defendant McMaster's threatened prosecution is therefore barred in that it seeks to apply South Carolina law to activity that takes place wholly outside of the State. Postings on the South Carolina-directed craigslist site are not limited to persons or activities within the State; they can equally involve commerce that takes place in other (especially neighboring) States. Moreover, the South Carolina-directed site is viewable from anywhere in the world. Defendant McMaster's threatened prosecution would effectively shut down the site not only for persons posting and viewing in South Carolina, but for persons out-of-state who find the site valuable for discussion, goods and services, and other information. As the Fourth Circuit has said, "[g]iven the broad reach of the Internet, it is difficult to see how a blanket regulation of Internet material … can be construed to have only local effect." *PSINet, Inc.*, 362 F.3d at 240; *see also Southeast Booksellers Ass'n v. McMaster*, 371 F.Supp.2d 773, 787 (D.S.C. 2005) ("In the words of the Fourth Circuit, '[t]he content of the internet is analogous to the content of the night sky. One state simply cannot block a constellation from the view of its own citizens without blocking or affecting the view of the citizens of other states.'" (quoting *PSINet, Inc.*, 362 F.3d at 240)).

Second, States may not enact a law that imposes burdens on interstate commerce that "are excessive in relation to the local benefit it confers." *PSINet, Inc.*, 362 F.3d at 240. craigslist's South Carolina site contains postings related to many goods and services that are being offered for sale or purchase in interstate commerce, and shutting down the site would impose a significant burden on that commerce. Moreover, attempts to regulate the South Carolina site would regulate speech on national forums, involving persons in all States outside of South Carolina. At the same time, the local benefit of the threatened prosecution would be minimal: South Carolina residents would have easy access elsewhere on the Internet and in other media to the same type of content that the Defendant seeks to restrict. *See PSINet*, 362 F.3d at 240 (restriction of online sexually explicit material "will have no local benefit given the vast number of other communication options available").

Accordingly, craigslist has a substantial likelihood of prevailing on its claim that Defendant McMaster's threatened prosecution violates the Commerce Clause.

2. Plaintiff Has, and Will Continue To, Suffer Irreparable Harm if Defendants Are Not Restrained

The Supreme Court has explained that "loss of First Amendment rights, for even minimal periods of time, unquestionably constitutes irreparable injury." *See Elrod v. Burns,* 427 U.S. 347, 373 (1976) (internal citation omitted). Because similar concerns for expressive freedoms also lie at the root of Section 230's protections, *see Zeran*, 129 F.3d at 330-31, even short-lived violations of the rights protected by that statute also entail irreparable injury. In addition, when the failure to grant preliminary relief creates the possibility of permanent loss of customers to a competitor or the loss of goodwill, as would almost certainly accompany an unfounded criminal prosecution, the irreparable injury prong is satisfied. *Multi-Channel TV Cable Co. v. Charlottesville Quality Cable Operating Co*., 22 F.3d 546, 552 (4th Cir. 1994); *Merrill Lynch, Pierce, Fenner and Smith v. Bradley*, 756 F.2d 1048, 1055 (4th Cir. 1985).

As is evident from Defendant McMaster's persistent and ominous threats, craigslist will suffer immediate and irreparable damage if the Court does not grant relief. The speech of craigslist, its management, and its users has already been unconstitutionally chilled by the threat of prosecution. This impermissible deprivation of fundamental First Amendment rights will continue unless the Court grants injunctive relief. In fact, Defendant McMaster has *already* announced that he is pursuing a criminal investigation and potential prosecution of craigslist because, in his view, craigslist had not adequately conformed its conduct to his earlier threat of prosecution. McMaster's repeated threats put craigslist in the position of either complying with the letter of the his demands (which would necessarily entail shutting down completely at least the portions of the site directed at South Carolina) or risking prosecution for activity that is protected by federal law and the Constitution. That is unacceptable, and immediate injunctive relief is necessary.

3. Defendants Will Suffer No Meaningful Harm From Complying With a Temporary Restraining Order and Preliminary Injunction

A temporary restraining order and preliminary injunction enjoining Defendants from commencing a prosecution of craigslist and its management on the basis of third-party content will result, at most, in a temporary delay to any enforcement effort by Defendants. Moreover, Defendant McMaster, by joining in the Joint Statement with craigslist in November, 8, 2008 expressly condoned measures that were then adopted by craigslist to control postings in its Erotic Services area, and current measures applying to the current Adult Services category are substantially more restrictive than the measures described in the Joint Statement. Defendant McMaster did not renege on this position until just May 5, 2009, when he commenced the threats that led to this action. Thus, any potential harm from deferring any criminal prosecution for a short period while this Court considers the merits of craigslist's need for an injunction would be at most minimal. This potential harm is significantly outweighed by the serious harm to First Amendment and other constitutionally protected interests that craigslist and its thousands of users would suffer if craigslist were forced to shut down the site. *See Carolina Pride, Inc. v. McMaster*, 2009 WL 238206, *13-14 (D.S.C. Jan. 30, 2009). Moreover, the Defendants "do not have a legal interest in the enforcement of an unconstitutional statute." *Id.*

4. Issuance of a Temporary Restraining Order and a Preliminary Injunction Will Serve the Public Interest

It cannot be questioned that upholding constitutional rights, *see Giovani Carandola, Ltd. v. Bason*, 303 F.3d 507, 520-21 (4th Cir. 2002), furthering federal policies with regard to the Internet under Section 230, and protecting interstate commerce serves the public interest.

C. craigslist Should Not Be Required to Post a Bond

Federal courts construing Federal Rule of Civil Procedure 65 permit a trial court to require no bond where the nonmoving party failed to demonstrate any injury. "[T]he trial judge has wide discretion in the manner of requiring security and if there is an absence of proof showing the likelihood of harm, certainly no bond is necessary." *Continental Oil Co. v. Frontier Refining Co.*, 338 F.2d 780, 782 (10th Cir. 1964); *accord Doctor's Assocs., Inc. v. Stuart*, 85 F.3d 975, 985 (2d Cir. 1996); *see also West Virginia Highlands Conservancy v. Island Creek*

Coal Co., 441 F.2d 232, 236 (4th Cir. 1971) (holding that a nominal bond of $100 was sufficient where defendant failed to show it would suffer more than negligible harm as a result of having to delay timber cutting until the issues raised in the litigation could be decided).

Here, there is no indication that Defendants will suffer any cognizable harm during the time that the temporary restraining order and preliminary injunction are in effect. This motion simply requires preservation of the status quo. Because Defendants will not be harmed by the issuance of a temporary restraining order or preliminary injunction, craigslist should not be required to post a bond.

IV. CONCLUSION

For the foregoing reasons, craigslist respectfully requests that its motion for a temporary restraining order and preliminary injunction be granted.[4]

DATED this 20th day of May, 2009.

Respectfully submitted,

CRAIGSLIST, INC.

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[4] In the alternative, in the event the Court denies craigslist's requests for a temporary restraining order and preliminary injunction, craigslist requests that the Court order a speedy hearing on craigslist's request for declaratory judgment, as provided for in Federal Rule of Civil Procedure 57.